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IN THE

Supreme Court of the United States

October , 1966

No. 62

SAMUEL SPEVACK,

Petitioner,

against

SOLOMON A. KLEIN,

Respondent.

BRIEF OF NEW YORK STATE ASSOCIATION OF TRIAL LAWYERS AS AMICUS CURIAE.

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The Interest of the Amicus Curiae

The New York State Association of Trial Lawyers is a self-governing bar association with a membership of 3500 New York lawyers who practice particularly in personal injury law. It is the New York affiliate of the American Trial Lawyers Association.

The *amicus curiae* believes that the judgment below seriously impairs the right to engage in the practice of law by depriving lawyers of an important constitutional right. The *amicus curiae* submits this brief with the consent of the attorneys for both parties.

Statement of Facts

Petitioner, a practicing attorney in New York for some forty years, was subpoenaed to appear with his books and records before a Judicial Inquiry ordered by the Appellate

Division of the Supreme Court of New York, Second Department. He appeared but refused to produce the records called for or to answer questions in relation thereto, relying on the privilege against self-incrimination provided by Article 1, Section 6, of the New York State Constitution and by the Fifth Amendment and the Fourteenth Amendment of the United States Constitution (R. 115-18).

Disciplinary proceedings were then filed charging misconduct in ten separate respects, including eight specific allegations relating to filing of retainer statements and handling of clients' funds, a ninth charge of obstructing the Inquiry and a tenth charge of misconduct for refusal to answer questions and to produce the records subpoenaed as aforesaid. At a hearing before a referee on these charges the eight specific charges were abandoned, the ninth was dismissed for failure of proof and the tenth was sustained on the referee's finding that petitioner had refused to testify and to produce records under constitutional privileges based upon the Fourth, Fifth and Fourteenth Amendments and upon relevant state constitutional privileges.

The Appellate Division entered a judgment disbarring petitioner for this refusal to testify and to produce records, relying upon *Cohen* v. *Hurley,* 366 U. S. 117, and holding that although an attorney has "an absolute right to invoke his constitutional privilege against self-incrimination" when he does so "he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently forfeit his privilege of remaining a member of the bar."

The Court of Appeals affirmed in a memorandum order without opinion on the authority of *Cohen* and on the further ground that the Fifth Amendment does not apply to the production of records as called for here.

ARGUMENT

Disbarment for asserting a constitutional privilege is a denial of due process even though it be designated a failure to co-operate with a judicial inquiry.

Fairly summarized, the arguments of the respondent come down to the contention that lawyers engaged in "contingent fee practice" owe a special duty of co-operation with a judicial inquiry into such practice, a duty which is superior even to the constitutional privilege against self-incrimination. Respondent's repeated condescending references to "contingent fee" practitioners reveals perhaps, the true reason for the fervor with which he adheres to the unfounded and unsupportable assertion that the dignity and virtue of the bar cannot be preserved unless lawyers relinquish the great rights that the Constitution preserves for all citizens. Respondent, despite his protests to the contrary, is evidently of the view that it is basically unethical, or at least highly suspect, for a lawyer to have his fee payable only if his efforts are successful and measured, in that event, by a percentage of the amount recovered. But this view, were it to be accepted, would deprive a very large number of litigants in our country of effective legal representation. Nothing is more firmly settled under our judicial system than that the acceptance of contingent fee retainers by lawyers is not only wholly proper but is a social necessity. Perhaps this is particularly true at this time when legal representation for those financially unable otherwise to obtain it is of great concern to the organized bar.

On behalf of our membership we must express our shock and concern at the animus toward a substantial segment of the bar that pervades the respondent's pleadings and briefs in this action. We suggest that this subjective view is irrelevant to the issue and cannot be permitted to justify deny-

ing lawyers the privilege against self-incrimination and requiring them to give evidence against themselves, particularly in the absence of any showing that the means otherwise and already available for ensuring adherence to the ethical standards of the bar are not wholly adequate for this purpose.

Although both the Appellate Division and the Court of Appeals held that the disciplinary judgment here was based, not on the attorney's "absolute right to invoke his constitutional privilege" but rather on his failure "in his inherent duty to the court. . .", it seems clear enough that the actual question, as viewed by the Courts below, is the application of the privilege as it is affected by the special status of lawyers.

We leave for the petitioner the argument as to the application of the privilege as it pertains to the production of records here, a distinction apparently pressed by respondent.

The point made in *Cohen* v. *Hurley*, 7 N. Y. 2, 488, affirmed 366 U. S. 117, that lawyers have a "special position" which carries with it a duty of "loyal co-operation" in judicial investigations, it seems to us ignores the greater weight of constitutional right. So long as there exists the absolute protection of the Constitution, surely there can be no balancing of obligation over privilege, of a duty to cooperate over the right not to be compelled to incriminate oneself. If this be a right which by our history and most sacred tradition protects one accused of the most serious crime, can it be given in a diluted form to the lawyer called upon to produce all his financial records and to testify concerning them?

We may not overlook the fact that there was only one ground for the disbarment of the petitioner here, his claim of constitutional privilege. As Judge Fuld of the New York Court of Appeals noted in his dissent in *Cohen, supra*, "this fact cannot be altered or disguised by styling his con-

duct a 'refusal to cooperate with the court.' It is to substance that we must look, not to form or labels. The courts should not sanction so easy an avoidance of a constitutional guarantee of a fundamental personal right."

A judicial rule penalizing use of the privilege is as much a denial of due process as it was in *Slochower* v. *Board of Education,* 350 U. S. 551, where it resulted from legislative enactment.

As long ago as 1953, the Committee on Law Reform of the Association of the Bar of the City of New York opposed the enactment of a statute subjecting lawyers to disbarment proceedings if they refused to sign waivers when called to testify concerning their conduct as lawyers (Report No. 2029, April 22, 1953).

The effects of such an attack upon the Fifth Amendment privilege reach the independence of the bar. Lawyers who must choose between their constitutional rights and their license to practice law have, in effect, given up their rights. The profession of the law, the historic shield between man and his sovereign, is too valuable to be placed in jeopardy by such a choice. There are few professions and no occupations in which the consequences of occupational expulsion are so devasting. Public disgrace, loss of livelihood and expulsion from the profession which has constituted his life's work are the disbarred lawyer's fate. See *Bradley* v. *Fisher,* 13 Wall (80 U. S.) 335, 355.

This is not to question the desirability of the highest standards of behavior. There is nothing inconsistent in requiring both high standards of the professional man and strict proof and fair procedures of his prosecutors and judges. *Ex Parte Garland,* 4 Wall (71 U. S.) 333, 379; *Ex Parte Secombe,* 19 How. (60 U. S.) 9, 13.

This Court's decision in *Cohen* rested, in part at least, upon the unavailability of the Fifth Amendment's privilege

to a state court proceeding under the decisions as they then stood. Since then, the conclusion by the Court in *Malloy* v. *Hogan*, 378 U. S. 1, that the Fourteenth Amendment protects the assertion of the Fifth Amendment's privilege in state proceedings, gives the Court a new opportunity to remove the cloud from the privilege and to give reassurance to the entire bar of this country on the subject of the primacy of personal liberties, including those of lawyers, under our Constitution.

CONCLUSION

The judgment of disbarment should be reversed.

Respectfully submitted,

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